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No. 09-201

Supreme Court, U.S.
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In The
Supreme Court of the United States

SIMPLICITY MANUFACTURING, INC.,
Petitioner,

v.

WAYNE BERRIER ET UX.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION AND SUPPLEMENTAL BRIEF FOR WRIT OF CERTIORARI

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ARGUMENT

Minor plaintiff Ashley Berrier and her parents, respondents herein, submit this Brief in Opposition to a Petition and Supplemental Brief for Writ of Certiorari filed by Simplicity Manufacturing, Inc. Following review of the original Petition, the Berrier respondents decided that they would not file a brief in opposition, and accordingly submitted a waiver form on September 11, 2009. Thereafter, a Supplemental Brief was received from Simplicity on October 2, 2009. While the Berrier respondents continue to believe a formal response to the Petition for Writ of Certiorari is unnecessary, the Supplemental Brief warrants some reply. The waiver was withdrawn on October 5 so that this Brief in Opposition to a grant of certiorari could be filed.

Certiorari is generally appropriate to resolve a conflict within the federal circuit courts, to resolve a conflict between the federal circuit courts and a state supreme court, or to decide an important question of federal law. The Petition for Writ of Certiorari and Supplemental Brief from petitioner Simplicity confirms that none of these circumstances is present here. On the contrary, this case involves a situation in which a federal circuit court (the Third Circuit Court of Appeals) was obligated to predict how a state supreme court (the Pennsylvania Supreme Court) would decide an issue it had not expressly addressed before. While the state supreme court allowed discretionary review of another case (the Bugosh case) which would have permitted it to embrace (or reject) the prediction of the federal circuit court, the state supreme court ultimately

elected not to decide the merits of the appeal, and instead dismissed the case on grounds that discretionary review should not have been allowed in the first place. Simplicity has now filed a supplemental brief to advise that since the procedural dismissal by the state supreme court, two district courts have divided on whether the federal circuit court's prediction remains authoritative in light of the state supreme court's non-decision.

No issue of federal law is presented by these circumstances. It is not disputed that the Third Circuit Court of Appeals had not only the right, but the duty, to predict Pennsylvania law in an area where the Pennsylvania Supreme Court had not clearly spoken.[1] The fact that there is some hiatus between the time of a federal circuit court's prediction of state law, and the state supreme court's consideration of the issue is, of course, both inevitable and unavoidable. The additional fact that there are intervening federal district court cases which may consider the accuracy of the circuit court's prediction, pending resolution of the issue by the state supreme court, is similarly a common occurrence. That the Berrier case once again

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[1] Indeed, the issue upon which the Third Circuit made its prediction, i.e., whether "bystanders" would be protected under Pennsylvania's product liability law, was the subject of a certified question by the Third Circuit to the Pennsylvania Supreme Court more than one year before the Berrier opinion was issued. However, in a one-sentence order issued 9 months after receipt of the certified question, the Supreme Court declined to answer the certified question, leaving the Third Circuit with no choice but to decide the case by predicting the probable direction of Pennsylvania law.

presents this familiar scenario - in which a circuit court's prediction must await validation until the issue at hand is decided by the state supreme court - is not a matter which could or should provoke review by the Supreme Court.

Nor do the two opinions from the United States District Court for the Eastern District of Pennsylvania, attached to Simplicity's supplemental brief, support the Petition for Writ of Certiorari. In Richetta v. Stanley Fastening Systems, No. 07-CV-3814, 2009 WL 2707549 (E.D. Pa. August 25, 2009), the district court, by the Honorable Thomas Golden, District Judge, decided that the Berrier court's prediction that Pennsylvania would adopt sections 1 and 2 of the Restatement (3d) of Torts was applicable. The District Court held that the Pennsylvania Supreme Court's procedural dismissal of Bugosh v. I.U. North America, Inc., 971 A.2d 1228 (Pa. 2009), was not a decision on the merits and could not be interpreted as an endorsement or rejection of the Third Circuit's prediction in Berrier. While a subsequent decision by Federal Magistrate Judge Jacob Hart in Durkot v. Tesco Equipment, No. 08-4538, 2009 WL 2902315 (E.D. Pa. September 9, 2009), found that the procedural dismissal in Bugosh represented an outright rejection of Berrier, Magistrate Hart's analysis is suspect. By assigning substantive weight to the single-sentence Order of the Supreme Court, e.g., "appeal dismissed as having been improvidently granted," the Durkot court chose to ignore the Pennsylvania Supreme Court's own pronouncement of the non-substantive impact of the procedural dismissal which occurred in Bugosh:

> [A] dismissal as being *improvidently granted* has the exact same effect as if this Court had denied the petition for allowance of appeal (allocatur) in the first place. Where we dismiss an appeal as *improvidently granted*, the lower tribunal's opinion and order stand as a decision of that court and this Court's order has *no* precedential value.

Commonwealth v. Tilghman, 673 A.2d 898, 904 (Pa. 1996) (emphasis original). Magistrate Hart's decision to ignore as mere "dicta" the Pennsylvania Supreme Court's explanation of the non-significance of an appeal dismissed as improvidently granted, and his unprecedented determination that such a procedural dismissal should somehow be treated as an affirmative rejection of the Berrier court's analysis, is unsupported by any case or authority.

In any event, the fact of a conflict between Judge Golden and Magistrate Hart about how to interpret the Pennsylvania Supreme Court's procedural dismissal of the Bugosh case is irrelevant to the Petition for Writ of Certiorari. The Third Circuit will review these decisions if they are appealed, and if necessary revisit the vitality of its prediction about Pennsylvania state law. As in every other instance of a prediction by a federal circuit court of the likely direction of a particular state's law, the issue will be sorted out by the normal appellate processes. There simply is no significant issue here requiring the Supreme Court's intervention.

CONCLUSION

For the reasons set forth herein, the Berrier Respondents request that the Petition for Writ of Certiorari be denied.

Respectfully Submitted,

/s/ _____

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